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Increasing the requirements to show antitrust harm in modernised effects-based analysis: an assessment of the impact on the efficiency of enforcement of Art 81 EC

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A new Agenda for European *Rule of reason* analysis

7.1 Introduction

European antitrust case law, decision practice, and guidelines do not work in unison to inform firms active on the Common Market about the legal standard applied in effects-based analysis, that is, about the precise location of the dividing line between permissible and impermissible restraints of competition. There appear to be discrepancies between the new approach set out in the Commission's guidelines¹ and what it does in practice.² Closely related is the fact that the potential of Commission decisions to clarify the new approach (by signalling to firms what weight will be accorded to the different considerations listed in the guidelines) is not fully used.³

This chapter describes in detail what substantive adjustments must be made to the legal standard in order to make the Commission's effects-based practice more focused and its decisions more insightful on issues that are crucial in self-assessment by potential offenders. It is argued, in Section 7.2, that the way forward is to emphasise empiricism in assessing the impact of restraints. In particular, the Commission should be required to produce more conclusive evidence of consumer harm – a tangible or at least plausible reduction of output, quality, choice, or innovation – before the burden is allowed to shift to the defendant. Section 7.3

¹ See the Guidelines on Vertical Restraints, [2000] OJ C291/1; the Guidelines on the applicability of Article 81 to horizontal co-operation agreements, [2001] OJ C3/2; and particularly the Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97. For a discussion of these and related documents, see Chapter 2, Section 2.4.

² See Chapter 4, Section 4.3.1. There we saw that contemporary decision practice includes more than a few examples of interventions in situations where the risk of consumer harm is far from obvious and where the structural concerns have not been systematically addressed.

³ See Chapters 4 and 5. Many Commission decisions are motivated in abbreviated form only. And even in its more elaborate decisions the issue of harm is often not fully brought into focus.

offers some considerations concerning the effects of this proposal on the enforcement costs of the Commission and private enforcers. Since asking for more evidence of harm is very similar to the call for the application of a *rule of reason* that was rejected by the CFI in the case of *Métropole*,⁴ Section 7.4 examines the compatibility of this proposal with the broader framework of European antitrust. A final section concludes.

7.2 Empiricism in the analysis of restraints

Serious scrutiny of evidence regarding consumer harm is made necessary by ongoing developments in Industrial Organization. As economists have improved their understanding of the way markets function, the number of factors that are recognised to potentially influence the welfare effect of a specific type of restraint have increased.⁵ Thus, the scope for classifying restrictions on the basis of their outward appearance (the features of an agreement) has been reduced, and the value of analysing market structure, as an indicator for the negative impact of a restraint, has been eroded. Given that in all but the most egregious or evidently innocuous cases evidence related to the terms of an agreement or to market structure will be insufficient to determine whether an agreement poses a genuine threat to consumers, it is necessary to expand the analysis of restraints and to widen the evidence that will be relied upon. The guidelines issued as part of the modernisation process show that this message has come across in Brussels.⁶ Still, as we have seen, this is not fully reflected in the Commission's post-modernisation practice. There are problems, in particular, with over-inclusiveness and the motivation of decisions. To obtain an view on the substantive changes needed to solve these problems, it is useful that we discuss these issues in some more detail.

When the Commission – in the analysis under Art 81(1) EC – shows that an agreement restricts competition and that it must be seen against the background of a market in which the defendant is a significant player, this does not prove that consumers will be harmed. The agreement might generate efficiencies, but even

⁴ *Métropole v. Commission*, [2001] ECR II-2459. This is illustrated by the recent decision in *Master Card* (decision of 19 December 2007, published on the Commission's website) where the Commission refused to make room in the assessment under Art 81(1) EC for the defendant's argument that the restriction at issue served to expand rather than restrict output.

⁵ For a discussion on developments in Industrial Organization, see Chapter 5, Section 5.2.1.

⁶ *Supra*, footnote 1.

without them, it isn't necessarily the case that harm will ensue. Whether the *potential* for harm that is thus established materialises is, in practice, examined under Art 81(3) EC. Recall, for example, the case of *Bass*, where the Commission, in the analysis under Art 81(1) EC, formulated a price discrimination claim on the basis of a considerable differential in the price of beer supplies charged to different types of outlets.⁷ In the investigation pursuant to Art 81(3) EC this price difference was found to be caused by the extra costs Bass incurred in servicing one of these groups, rather than by discrimination. In reality, therefore, there was no adverse effect on consumers and, as a consequence, genuine pro-competitive efficiencies did not have to be examined.

In the vast majority of the Commission's decisions, however, this crucial phase of the investigation is jumped over and the investigation under Art 81(3) EC starts immediately with the identification of pro-competitive efficiencies.⁸ Note, first of all, that this may tend to produce type 2 errors in Commission decisions. Failure to verify whether the potential adverse effect of the original agreement materialises creates the risk that the antitrust laws are used to condemn competitive behaviour.⁹ What is more important is that, even if the Commission's decisions are free of errors, the failure to address the issue of harm explicitly, combined with a continued reliance in exemption and commitment decisions on criteria that are more inclusive than those advanced in the Commission's guidelines, creates confusion that complicates self-assessment by firms and may lead them to under or over-comply.

From a substantive perspective, therefore, the necessary adjustment to the legal standard in effects-based analysis consists of two components. To discharge its burden of proof under Art 81(1) EC, the Commission should be required to articulate a plausible theory of harm and to present evidence in support of the crucial elements of that claim. To begin with the first of these components, the theory of harm must explain how the defendant's conduct (the agreement and the way it is implemented)

⁷ [1999] L186/1; discussed in Chapter 4, Section 4.3.2.

⁸ See Chapter 4, Section 4.3.2. In addition to the case of *Bass* (supra, footnote 7) the question whether the Commission's theory of harm actually comes true is addressed in only two of the 32 effects-based decisions studied. These are the case of *Van den Bergh Foods* ([1998] L246/1) and *Master Card* (supra, footnote 4). For a discussion of both cases, see Chapter 4, Section 4.3.2.

⁹ This risk is particularly great for conditional clearance decisions. Naturally, the conditions imposed (commitments under the current framework) are such as to make the agreement less restrictive. We saw in Chapter 4, Section 4.3.1, that contemporary decision practice includes more than a few examples of such decisions involving situations where the risk of consumer harm is far from obvious and where the implications of market structure have not been systematically addressed. It is submitted that, given these circumstances, it may be doubted whether actual consumer harm was prevented by so doing.

lead to harm given the characteristics of the market at issue. And the alleged harm should be of the right type; that is, harm to consumers (in the form of higher prices, lower quality, less choice, or a reduced level of innovation). Next, this theory should be plausible, meaning that it fits with modern economic insights and the facts of the case. Most important, the Commission should present evidence to support this theories (and rebut arguments that tend to undermine it) before the burden is allowed to shift to the defendant.

Implications for the way restraints are analysed

US case law can be looked at to form a more detailed image of the role that some of these requirements play in antitrust litigation. The case of *Matsushita*¹⁰ provides a prime example of the effect of presenting an improbable theory of harm. Zenith, an American manufacturer of television sets, filed suit against 21 Japanese competitors on the US market. Zenith claimed that the defendants cartelised the Japanese market so as to be able to sell at artificially low prices in the US, in an attempt to drive Zenith and others off the market. The Supreme Court found this claim to be hard to sustain on theoretical grounds. Using Japanese supra-competitive profits to sustain losses on the other side of the Pacific would be sensible only if there was a reasonable expectation that there would be returns on this investment. The Court observed that where predatory pricing is hard to pull off for a single firm, coordinating loss-making pricing over an extended period of time by a group of more than 20 firms is more daunting still. Crucially, also, to recoup the losses the cartel would have to be kept in place, now to charge monopoly prices, which would attract new entrants and the attention of the antitrust authorities. Setting out the principles that governed the assessment of this case, the Court stated that:

[If] the factual context renders respondents' claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.¹¹

¹⁰ *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

¹¹ *Id.* At 577.

Claims that are not based on an identifiable and acceptable theory of harm and claims based on an implausible theory of harm that is not supported by substantial evidence can thus be eliminated.¹² Arguably, the Commission's reasoning in a case like *TPS* would not meet the requirement that a plausible theory of harm is articulated.¹³ *TPS* was a joint-venture providing pay-television in France. This market was, at the time, heavily dominated by one player, Canal+, with over 4 million customers. There were several much smaller competitors in the market, including the joint venture, which had some 460.000 customers. *TPS* foresaw considerable growth in coming years. The joint venture agreement granted *TPS* the right of first refusal to programmes in the portfolios of its parents. In its decision the Commission underscored the importance of this clause to *TPS* in acquiring a solid position on this quickly developing market. Given *TPS*' growth forecasts, the Commission limited the permissible duration of this restriction to three years. Nowhere in its decision, however, did it articulate how this clause might be used to exploit consumers.

The case of *California Dental Association*¹⁴ can be used to illustrate the implications of insisting on empirical evidence of consumer harm. As we saw before, this case involved restrictions on certain forms of advertising by members of an association of dentists.¹⁵ The Association argued that these restrictions benefited consumers, because they aimed to ensure the accuracy of the information contained in advertising in a market characterised by large disparities between the information available to the professional and the patient. The Supreme Court determined that the Court of Appeals had mistakenly required the Association to substantiate its affirmative defence. Given that restricting advertising has the potential to reduce

¹² The requirement to state a plausible claim is of significant important in US antitrust litigation. In a considerable proportion of the US cases examined in Chapter 4 (see Appendix B) district courts grant defendants' motions for summary judgment or motions to dismiss because no cognisable claim is stated, because the plaintiff fails to allege sufficient facts, or because the theory of harm is implausible and insufficiently supported by factual allegations. Examples are *American Telephone & Telegraph Co. v. IMR Capital Corp.* (888 F.Supp. 221) where plaintiffs fail to allege facts that support the claim that market power was exercised; *Floors-N-More, Inc. v. Liquidators* (142 F.Supp.2d 496) idem; *Reddy v. Good Samaritan Hospital* (137 F.Supp.2d 948) where it was found that the exclusion from practice in one hospital cannot have an adverse effect on consumers in a national market; *Todd v. Exxon Corp.* (126 F.Supp.2d 321) where the plaintiff failed to allege a plausible relevant market; and *Suzuki of Western Mass, Inc. v. Outdoor Sports Expo, Inc.* (126 F.Supp.2d 40) where a claim alleging a reduction on intra-brand competition was thrown out since nothing in the purported scheme indicated that customers were prevented from buying other manufacturers' products.

¹³ [1999] OJ L90/6.

¹⁴ *California Dental Association v. FTC*, 526 U.S. 765 (1999).

¹⁵ See the discussion of this case in Chapter 4, Section 4.3.1.

demand for dental services, it was not entirely obvious that it would also result in a restriction of supply – the focus of antitrust concern. Whether it did was judged to be a question for empirical analysis that should have been addressed by the FTC before the burden was allowed to shift to the defendant.

Applied to European antitrust this reasoning would imply a significant shift in the burden of proof, since the question whether the harmful potential of a restraint materialises is currently addressed in the analysis under Art 81(3) EC. Take, for instance, the Commission’s recent decision in the case of *Master Card*.¹⁶ The Master Card system involves four parties. These are merchants that accept card payments, their banks, card holders, and the banks that issue cards. The Commission took issue with a rule in Master Card’s bylaws setting a fee charged by the issuing bank to the merchant’s bank in the absence of specific bilateral agreements between such banks on transaction fees.¹⁷ Relying on several forms of direct evidence (two quantitative studies of the price effect produced by the default fee and a survey of merchants) the Commission showed that Master Card’s arrangement had the actual effect of inflating the charges set to merchants.¹⁸

Master Card argued that the default fee included in its bylaws – even if it set a floor under the fees charged by issuing banks to merchants’ banks – worked so as to promote the total output of the scheme. The benefits that either group of customers derives from a credit card system depend on the number of customers in the other group that subscribe. The more Master Cards are in circulation, the more attractive it becomes for merchants to take part, and the more outlets accept Master Cards, the more use they will be to consumers. Master Card argued that in the absence of a default fee issuing banks would not consider the effects in the market for attracting merchants when determining the charges set to merchants’ banks.¹⁹ The function of the default fee, in its view, was to correct for such imbalances and optimise the utility of the system for both groups.

The question raised by Master Card’s defence is very similar to the one faced by the Supreme Court in *California Dental Association*. Master Card gave an alternative and not necessarily implausible pro-competitive explanation for the facts alleged by the Commission. If required to show consumer harm, the Commission could

¹⁶ *Supra*, footnote 4.

¹⁷ *Id.*, at para. 400 and following.

¹⁸ *Id.*, at para. 425 and following.

¹⁹ *Id.*, at para. 534 and following.

therefore not have deferred this empirical question to the analysis under Art 81(3) EC.²⁰

This shift in the burden of proof has important implications for the scope of the indispensability requirement of Art 81(3) EC. Currently, the phase of the investigation where it is verified that consumer harm indeed occurs falls within the reach of the indispensability requirement. Suppose that Master Card would have managed – in the analysis under Art 81(3) EC – to show that the default rule did not harm card holders and merchants. Technically, it would then still be vulnerable to the Commission’s argument that other networks managed to thrive without imposing a default rule, or that less restrictive means were available to achieve the same objective. If, however, the consumer harm check is run as part of the analysis under Art 81(1) EC, indispensability would come into play only if the Commission were able to show that the default rule restricted output.

It is important to note, also, that consumer harm can be shown in the form of direct evidence, by showing market power and the likelihood of its exercise, or by a combination of these. In cases such as *National Collegiate Athletic Association (NCAA)*²¹ – where the number of matches broadcast on television was limited – the restriction of output is self-evident so that market structure need not be examined. Where harm is less obvious, the effects of a restraint may be made visible by carrying out an experiment.²² The case of *Indiana Federation of Dentists*²³ can serve as an example. This case involved a federation of dentists who collectively refused to provide insurers with x-rays necessary to evaluate the diagnosis and treatment. Whether the federation’s policy suppressed competition among dentists with respect to co-operation with the requests by insurance companies, was easily answered in the affirmative by the Supreme Court. There was evidence in the record both of Indiana dentists’ perceptions that unrestrained competition tended to lead their colleagues to comply with insurers’ requests, and of the fact that outside of Indiana, where no ban existed, insurers generally found little difficulty in obtaining compliance by

²⁰ Similarly, the argument in *Bass* (supra, footnote 7 and accompanying text) that the observed price differential was caused by a higher level of service rendered to tied-outlets, would then have to be treated as a non affirmative defence.

²¹ *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 435 U.S. 679 (1978).

²² In this sense, see Cooper et al. (2005a and 2005b).

²³ *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

dentists.²⁴ Likewise, in the case of *California Dental Association*,²⁵ it is well possible to imagine an exercise in comparative statics that would have answered the question of empirical analysis pressed by the Court. This could be done, for example, by comparing prices in California with otherwise similar markets for dental services in which the advertisement rule did not apply, or comparing fees in counties with more than average association members, to those with a less than average number of members.²⁶

In other cases the situation absent the restraint may be difficult to show by means of direct evidence (alone), making analysis of market power – the capacity to hurt consumers and the likelihood that it was used – unavoidable. The difference between an assessment of market power that is focused on consumer harm and an analysis that centres on market structure can be illustrated by comparing the factually very similar cases of *Visa and Master Card (US)*²⁷ and *Morgan Stanley / Visa (EU)*.²⁸ In the US case, the Department of Justice challenged exclusionary elements of Visa's and MasterCard's bylaws that threatened member banks with expulsion if they issued cards on the competing American Express or Discover networks. The district court relied on a mix of direct and indirect evidence to examine whether allowing member banks to issue American Express and Discover cards would allow these companies to expand output and to offer card holders a wider range of choice and lower prices. Although the rigour with which these effects on consumer welfare were examined has met with criticism from US commentators,²⁹ what is important here is the key in which this decision is set. The European decision – which related to the acquiring market and involved the exclusion of Morgan Stanley from the Visa network – has a different outlook. The Commission examined the structure of the relevant market in detail and, in addition, showed that Morgan Stanley had significant experience as an acquiring bank and was large enough to achieve

²⁴ Id. at 456.

²⁵ Supra, footnote 14.

²⁶ The Commission's argument in its *Master Card* decision (supra, footnote 4) that that there was no objective need to establish a default fee to be charged by the issuing bank to the acquiring bank since there was evidence that other networks managed to operate without such a restraint is very similar in nature. In this regard, see, infra, footnote 48.

²⁷ *US v. Visa USA, Inc.* (163 F.Supp.2d 322). See the discussion of this case in Chapter 4, Section 4.3.1.

²⁸ Decision of 3 October 2007, published on the Commission's website.

²⁹ see e.g. Evans (2001) and Arquit and Koob (2004).

economies of scale.³⁰ Visa claimed that even without Morgan Stanley the market was highly competitive, by pointing to a dramatic fall in merchant service charges. Apparently, however, for the Commission the relevant criterion was not the extent to which merchants were affected, but whether the market was deprived of an able competitor.³¹ It is unlikely that a US court would have allowed the burden to shift to the defendant without further scrutiny of this matter.

Implications for the guidance available to firms

Requiring an acceptable theory of harm supported by sufficient empirical evidence in the investigation under Art 81(1) EC should lead to better motivated decisions and will, thus, contribute to increased legal certainty. More information should become available to firms about what constitutes antitrust harm and how the Commission goes about verifying its existence. At the same time, the process of balancing positive and negative effects under Art 81(3) EC should also become more insightful, as both effects would be stated in terms of their implications for consumer welfare. Finally, we saw in Chapter 6 that the Commission may react to an increase in its burden of proof by concentrating its enforcement efforts on more serious violations. Since commitment decisions may not be adopted in cases where it is appropriate to impose a fine,³² this will go hand in hand with a relative increase in the number of infringement decisions.³³ This is important, since they offer potential offenders – that is, firms in the stage of designing and agreement with possible antitrust implications – considerably more guidance. These effects of the proposed adjustment to the effects-based standard on enforcement costs are examined in the following Section.

³⁰ Apart from the fact that it focuses on the acquiring market instead of the issuing market, this decision is different in that the exclusion took the form of not allowing Morgan Stanley (the parent of Discover) to become a member of the Visa network. Given, however, that apart from Master Card there was no meaningful inter-brand competition, this difference is negligible.

³¹ *Supra*, footnote 28, at para. 199 and 200.

³² See the last sentence of recital 13 of Regulation 1/2003 ([2003] OJ L1/1).

³³ Note that this is a different result than one might initially expect. In general, one would expect enhanced legal certainty to lead less litigation and more settlements. This is because both sides will have better information with which to assess the merits of their case and will less often disagree on substantive issues. As a consequence, a negotiated outcome will more often be preferred way out for both parties. With respect to the guidance offered by infringement and commitment decisions, see the discussion in Chapter 5, Section 5.2.3.

7.3 Effects on enforcement costs

On the basis of the detailed proposals regarding the adjustments to be made to the effects-based standard that were presented above, it is possible to examine a question that was left unaddressed in Chapter 6. This is the question to what extent it is reasonable to expect that requiring the enforcer to show harm to consumers will lead to an increase in per-case enforcement costs. A distinction is made between the effect on the Commission's burden of proof (Section 7.3.1) and the effect on the costs incurred by private enforcers (7.3.2).

7.3.1 Transforming the Commission's burden of proof

It is not inevitably the case that imposing a consumer harm requirement translates into higher enforcement costs, at least not in every case. Surely, if adopting the consumer harm test is conceptualised as simply adding an element to the analysis of a restraint, the proposition that the enforcer's burden will rise is intuitively appealing. The Commission will have to discover, analyse and organise extra empirical data regarding consumer harm. However, framing the matter in this way would clearly be an over-simplification. It is more accurate to think in terms of a shift in the focus of the analysis. The precise effects on enforcement costs – an increase or a decrease – will depend on the circumstances of the case.

The European Courts put emphasis on market structure in the assessment under Art 81(1) EC.³⁴ Although direct evidence may play a limited part,³⁵ on the whole the Commission's approach in infringement decisions is largely similar. Shifting the focus of the analysis away from the effects of the restraint on competition (market structure) to the effect on consumers will pave the way for the use of direct evidence of a market-wide reduction of volumes, quality, choice, or innovation in the assessment under Art 81(1) EC. Since analysis of market structure is meant to capture the capacity to harm consumers, and direct evidence relates to some form of

³⁴ See Chapter 4, Section 4.3.1.

³⁵ E.g. in cases such as *Van den Bergh Foods* (supra, footnote 8), *Bass* (supra, footnote 7), and *Master Card* (supra, footnote 4).

manifestation of the harm itself, the two may be used as substitutes or as complements.³⁶

Because of their complexity, market definition and analysis of market structure are generally regarded to be particularly cumbersome and costly exercises. Arguably, they are the most challenging hurdles the Commission faces in presenting an effects-based claim.³⁷ A case like *NCAA*, where the challenged restraint was such that the effect of restricting output was evident, illustrates that analysis of market structure will not always be necessary, if consumer harm can easily be inferred by other means.³⁸ In US antitrust, such cases are by no means exceptional.³⁹ In cases involving comparable near-*per se* restraints,⁴⁰ the Commission already adopts similar reasoning.⁴¹

In other cases direct evidence may be sufficiently vocal to considerably reduce the effort that has to be put into the assessment of market structure. The case of *Indiana Federation of Dentists* provides a good example.⁴² This case involved a collective refusal to provide insurers with x-rays used to evaluate the diagnosis and treatment. As noted earlier, a restriction of output was easily inferred from evidence in the record indicating that outside Indiana, where no ban existed, insurers generally found little difficulty in obtaining compliance by dentists.⁴³ It is hard to see how amassing such evidence could lead to investigation costs in excess of those incurred in ordinary structural analysis.

³⁶ In fact, the majority of the plaintiffs in the cases listed in Appendix B based their claims on a combination of direct and indirect evidence.

³⁷ See e.g. *Bishop and Walker* (2002:82) and *Whish* (2003:24).

³⁸ *Supra*, footnote 21.

³⁹ Three of the 13 cases listed in Appendix B that reached the stage of trial succeed on the basis of similar reasoning (these are *Chicago v. NBA* (754 F.Supp. 1336), *Sessions v. Joor* (786 F.Supp. 1518), and *US v. Brown University* (805 F.Supp. 288)) and three of the five plaintiff's motions for summary judgment that are granted involve this type of quick-look analysis (these are: *Law v. NCAA* (902 F.Supp. 1394), *Southtrust v. Plus* (913 F.Supp. 1517), and *Continental v. United* (126 F.Supp.2d 962)).

⁴⁰ Such as *Visa International – MIF* ([2002] OJ L318/17), *IFPI Simulcasting* ([2003] OJ L107/58), and *Belgian Architects* (decision of 24 June 2004, published on the Commission's website).

⁴¹ See Chapter 4, Section 4.3.1; and specifically the text accompanying footnotes 87-92.

⁴² *Supra*, footnote 23.

⁴³ *Id.* at 456. In essence, the Commission's argument in its *Master Card* decision (*supra*, footnote 4) that there was no objective need to establish a default fee to be charged by the issuing bank to the acquiring bank since other networks managed to operate without such a restraint is very similar in nature. The argument remained under-developed, however. As we saw above, Master Card argued that in the absence of a default fee issuing banks would not consider the effects in the market for attracting merchants when determining the charges set to merchants' banks. The function of the default fee, in its view, was to prevent the setting of unreasonable fees and, thus, to make the system grow and let output expand. The other networks to which the Commission pointed were all much smaller than Master Card. The Commission's evidence, therefore, does not go so far as to refute Master Card's interpretation.

It can be expected, however, that in the majority of cases evidence of effects will not stand alone, and at times it may not even be available. An investigation of the capacity to produce negative effects – the approach that currently dominates in European antitrust – will then be inevitable. The discussion of the *Master Card* decision illustrates that in such cases the weight of the Commission’s burden may indeed increase if a showing of consumer harm is required in the analysis under Art 81(1) EC.⁴⁴ Showing the tendency inherent in the restriction and the relative size of the defendant will then be insufficient to make the burden shift to the defendant. Some indication that this tendency materialises must be added. Moreover, this indication should be of such a nature that it rebuts any alternative explanation of the effect in the same dimension of output that is offered by the defendant. In other words, Master Card’s argument that the default interchange fee served to expand output and benefited card holders and merchants would have to be addressed by the Commission within the scope of the analysis under Art 81(1) EC.

Where a showing of market power is inevitable, adopting a requirement to show harm does not always have to lead to an increase in the Commission’s burden, however. This can be appreciated as follows. Traditional investigation of market power consists of two stages. In a first phase the relevant market is studied to form a view of the context in which the restraint must be seen. Generally, a very broad perspective is adopted in this part of the investigation. Next, an investigation is made of the effect of the restraint on competition in this market, principally by reference to the defendant’s market share.⁴⁵ Imposing a consumer harm requirement and adopting an investigatory strategy that focuses, from the start, on verification of the alleged theory of harm makes it possible to integrate these two stages of analysis. Doing so may allow for economies to be made in the investigation (Salop, 2001: 189).⁴⁶

Consider the claim formulated by the plaintiffs in the (US) *Kodak* case.⁴⁷ This case involved the servicing of photocopying machines produced by this manufacturer. Originally, Kodak competed on servicing with independent service providers (ISOs). Later Kodak changed its policy and refused to supply parts to ISOs. This forced many ISOs out of business, and left users of Kodak equipment

⁴⁴ Supra, footnote 4.

⁴⁵ In cases involving exclusive dealing, the extent to which the challenged agreements contribute to the level of foreclosure in the market will also be taken into consideration. See the discussion of the case of *Stergios Delimitis v. Henninger Bräu* ([1991] ECR I-935) in Chapter 4, Section 4.3.1.

⁴⁶ In a similar sense, see Patterson (2000).

⁴⁷ *Image Technical Services, Inc. v. Eastman Kodak Co.* 504 U.S. 451 (1992).

with no alternative but to rely on Kodak's more expensive servicing. Proving this claim requires examination of ISOs' options to obtain parts elsewhere and the options open to owners of Kodak equipment to buy servicing elsewhere or to self-service. What information is available about servicing to purchasers of original equipment (OE) is also relevant. If they would be fully informed, any attempt by Kodak to over-charge for servicing would undermine its inter-brand competitiveness.

Structuring the investigation in such a way as to focus on these questions from the start – which implies working with the tentative market defined in the theory of harm – will lead to the production of much of the evidence that would result from traditional market analysis. It may, however, also help to avoid the sometimes intense litigation on the precise scope of the relevant market. More generally, it can serve to make market analysis more focused and, thus, to streamline effects-based analysis. For example, if approached in the ordinary way, it is not at all unlikely that the *Kodak* case would have generated considerable preliminary debate about whether for antitrust purposes servicing of Kodak equipment constituted a separate market, a dependent market, or no separate market at all. By focusing on the extent to which servicing is part of OE buyers' considerations, and the extent to which they have access to information about servicing, these types of either-or questions that come with market definition could be left aside.⁴⁸

In sum, it can be argued that the effects of adjusting the legal standard applied in the analysis under Art 81(1) EC are unlikely to be uniform. Overall, the burden can be expected to increase, but there will also be cases where the effect for enforcers is neutral or beneficial.⁴⁹ The weight of the burden of proof under Art 81(1) EC will be

⁴⁸ The case of *Van den Bergh Foods* (supra, footnote 8) can be used to illustrate that this approach could work for the Commission as well. This case involved the provision of free freezer cabinets to sellers of ice cream, on the condition that they could only be stocked with Van den Bergh's products. Given the limited amount of floor-space in the average outlet, this effectively came down to an exclusive purchasing agreement. Due to Van den Bergh's pre-eminent position on the market, the freezer cabinet policy closed off a considerable portion of the market for competing manufacturers of ice cream. To prove harm in this case, the Commission would have to show that this policy resulted in higher distribution costs for competitors than for Van den Bergh, which forced them to reduce their output and allowed Van den Bergh to raise its prices profitably. The case presented by the Commission did not address all aspects of this scenario. Adoption of a consumer harm requirement would result in additional investigations, therefore. At the same time, however, focusing from the beginning on verification of this theory would arguably have allowed the Commission to make do with a less expansive examination of the relative market than is displayed in its decision.

⁴⁹ Arguably, the effect of the gradual introduction of the consumer harm requirement in US *rule of reason* analysis has been the same. It is true that amongst US antitrust commentators it has become commonplace to note that bringing a successful claim has become more difficult since the 1980s. This is often illustrated by means of data on the number of private cases in relation to the number of government cases. According to Gavil et al. (2002: 999), from 1941 to the mid '60s, the ratio of private

a function of the plausibility of the theory of harm. This has the beneficial effect of concentrating enforcement efforts on those cases of which we are more certain that harm has actually occurred. At the same time, it may serve to ensure potential offenders that the less obvious it is to them that the contract they intend to sign will harm consumers, the less likely it is that it will be challenged.

The present section dealt with the effects of altering the legal standard to show a restriction on the Commission, the principal enforcer in European antitrust. Over the past decade, there has been a growing interest in stimulating private enforcement of Art 81 EC. In light of these developments, it is appropriate to briefly consider the effects on private enforcers. The next section argues that the implications are not the same as for the Commission.

7.3.2 Effects on private enforcers' costs

Private enforcement of antitrust is in its infancy in Europe. Although formal impediments have been removed, the obstacles to launching a successful damages claim involving an allegation that must be assessed under the effects-based standard remain formidable. If at all such claims are to succeed under current conditions, this is most likely to happen in the form of follow-on litigation, where private plaintiffs may benefit from evidence unearthed in anterior administrative proceedings. In principle, this form of private enforcement would not be seriously affected by a raise

to government cases tended to be 6 to 1 or less. From the mid '60s to the late '70s private cases exceeded government filings by 20 to 1. During the 1980s private filings fell substantially and the ratio of private to public cases stabilized at roughly 10 to 1.

Developments of both a procedural and substantive nature are pointed at to explain these events. The strict requirements for standing set out in the twin cases of *Hannover Shoe, Inc. v. United Shoe Machinery Corp.* (392 U.S. 481 (1968)) and *Illinois Brick Co. v. Illinois* (431 U.S. 720 (1977)) – which restricted standing to direct purchasers – as well as in the case of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (429 U.S. 477 (1977)) – setting out the antitrust injury doctrine – effectively deny access to court to substantial classes of potential private plaintiffs. On the substantive side, several practices that were previously held *per se* illegal are now subjected to *rule of reason* analysis (e.g. *Continental T.V., Inc. V. GTE Sylvania, Inc.* (433 U.S. 36 (1977)), which is generally considered to be more exacting (cf. Waller, 2003:230). Another important development was the tightening of summary judgment standards to see whether the plaintiff's claim is based on an acceptable theory of harm to consumers (see e.g. Page, 1989 and Calkins, 1986). And in *California Dental Association* (supra, footnote 14) the Court demanded actual evidence of such harm to be proffered, before the burden could shift to the defendant. It is important to consider the form that these modifications of the law took (cf. Blecher and Noblin, 1998). For the most part, these changes were designed to filter out substantively weak cases. The requirements for showing harm in cases that escape these hurdles have not necessarily increased, however. On several occasions, notably in *Indiana Federation of Dentists* (supra, footnote 23) and *California Dental Association* (supra, footnote 14), the Supreme Court has gone out of its way to underscore that showing harm does not necessarily require the type of extensive market analysis that was traditionally engaged in.

in the burden of proof, since the infringement will be established by the Commission. Given that evidence of consumer harm will bear a strong relation with the damages sustained by consumers that file suit, the adjustment may even be to their advantage. To understand these points, consider the following.

When the EC Treaty was adopted in 1957, antitrust was in many ways a novelty in the European context.⁵⁰ Not in the least to protect uniformity in this crucial early stage of its development, Regulation 17/62 concentrated the powers to shape the content of European antitrust in the hands of the Commission and the Court of Justice.⁵¹ By making the application of Art 81(3) EC dependent on authorisation by the Commission, national courts were effectively disqualified as a forum for antitrust litigation. At the dawning of the new century it was increasingly felt that, with the core legal principles well developed, damages claims filed before national courts by persons injured by anticompetitive behaviour could help to boost the deterrent effect of European antitrust. To this end, Regulation 1/2003 abolished the Commission's monopoly on the application of Art 81(3) EC.⁵²

Inspired, in part, by the various incentive mechanisms in place in US antitrust, a serious debate has been waged over the past years about whether and how European private enforcement should be stimulated. In the US, the treble damages provision of the Clayton Act⁵³ is considered to be crucial in motivating private enforcers to incur the elevated investigation costs that come with a *rule of reason* claim (see e.g. Salop and White, 1986: 1022).⁵⁴ The recent debate has clearly shown that punitive or multiple damages are regarded with much suspicion in Europe.⁵⁵ In certain member states, they are considered contrary to foundational principles of the legal order,⁵⁶

⁵⁰ See the discussion on the formative years of European antitrust in Chapter 5, Section 5.2.

⁵¹ [1962] OJ 13/204.

⁵² *Supra*, footnote 33.

⁵³ 15 U.S.C.A. §14.

⁵⁴ See also Cavanagh (1987: 825) on the pros and cons of detrebling in *rule of reason* cases and Waller (2003: 230) on the fact that *rule of reason* cases are considered more difficult to bring than *per se* cases.

⁵⁵ To a lesser extent, the same applies to other instruments available to private plaintiffs in US antitrust, such as contingency fees and opt-out class actions.

⁵⁶ See the 2004 comparative study on the conditions of claims for damages in case of infringement of EC competition rules (published on the Commission's website) at p. 130. Damages are generally seen to be compensatory in nature (p. 77). Only a handful of states allow damages that are punitive in nature (UK, Ireland, and Cyprus), and even there they are seldom awarded (p. 83). Note that in the UK national report it is expressly stated that it is unclear as of yet whether exemplary damages can be awarded for competition law infringements. The UK Law Commission has however recommended expanded use of exemplary damages awards. See the Law Commission's report no 247 entitled 'Aggravated, exemplary and restitutionary damages law,' of 16 December 1997 (published on the Law Commission's website). In any case, it is not contrary to EC itself for those countries to grant such

and it has been suggested that they may inspire frivolous claims (e.g. Wils, 2003). In any event, most discussions appear to be premised on the idea that the scope for their application must be limited to the most serious types of (*per se*) infringements.⁵⁷

Indeed, the advantages of stimulating private enforcement under the effects-based standard are not obvious under current conditions. Whilst it may be a useful instrument to increase deterrence for firms prone to under-compliance, it risks aggravating the tendencies of other firms to over-comply. Only with improved accuracy could private enforcement play a useful role in the context of effects-based analysis. With or without financial stimuli, however, it can be expected that this role will be modest. This is because damages are likely to be even more difficult to show than the infringement.

This will particularly be the case where, in the absence of good direct evidence, substantial analysis of market power is needed to establish an infringement. Recall that analysis of market power serves to examine the probability that consumers were harmed.⁵⁸ In essence, this exercise consists of showing the capacity to inflict harm and the likelihood that it was put to use. This type of analysis may produce sufficiently concrete results to conclude with reasonable certainty that Art 81 EC was infringed and, if the infringement is serious, to impose a fine. It is likely to fall considerably short, however, of identifying the amount of harm in euros sustained by individual consumers. Showing damages will therefore require a significant additional investigatory effort by the plaintiff.

This has several important implications. Firstly, if private enforcement should arise under the effects-based standard, it is more likely to take the form of follow-on suits, because they involve considerably less risk.⁵⁹ Adjusting the legal standard against which evidence of a restriction is examined will not adversely affect the burden of proof of follow-on plaintiffs. Naturally, such parties will rely on the results of the administrative proceedings to show that their opponent's conduct was illegal.

damages in competition cases. In *Factortame III* ([1996] ECR I-1029, at para. 90) the ECJ held that 'it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law'.

⁵⁷ See the Commission's 2005 green paper on actions for damages, at p. 34-44; the comments to this document that were received by the Commission, the Commission's 2008 white paper on compensating consumer and business victims of breaches of competition rules, at p. 55-61; and the comments to this document that were received by the Commission (all published on the Commission's website).

⁵⁸ See the text accompanying footnotes 27 and 28.

⁵⁹ This corresponds to the US situation as described in Waller (2003).

The more evidence of harm to consumers the Commission unearths, the easier it will be for follow-on plaintiffs to show that they have sustained damages. Finally, the link between consumer harm and damages tells us that the effect of adjusting the legal standard on the effective burden of plaintiffs that file an independent suit is likely to be less pronounced than would appear at first sight. The extra effort needed to show an infringement would – at least to some extent – be compensated for by a reduction in the effective burden to show damages.

This can be appreciated by considering the case of *Morgan Stanley / Visa*.⁶⁰ Visa tried to keep Morgan Stanley out of its network. For the Commission, the benchmark in this case was whether an able competitor was barred from accessing the market. If the Commission would have been required to show consumer harm under Art 81(1) EC, it would have been forced to address the effect of Morgan Stanley's exclusion on merchant service charges. Clearly, the evidence adduced by the Commission to meet this part of its burden would be directly relevant to merchants seeking to recover the anti-competitive premium that they paid over the years of Morgan Stanley's exclusion. Under current circumstances, these merchant-plaintiffs would have to start from scratch in developing their damages claim.

In discussing the Commission's other recent decision involving credit card networks, *Master Card*,⁶¹ we saw that such a change in the legal standard runs against the Commission's interpretation of Art 81 EC.⁶² Referring to the CFI's ruling in *Métropole* regarding the division of the burden of proof in Art 81 EC proceedings, the Commission refused to make room in the assessment under Art 81(1) EC for the defendant's argument that the restriction at issue served to expand rather than restrict output.⁶³ What remains, therefore, is to examine to what extent the proposed adjustment of the legal standard is compatible with the case law.

7.4 Compatibility with European antitrust

The ruling in *Métropole*⁶⁴ resulted from an appeal filed against the Commission's decision in the case of *TPS*.⁶⁵ Throughout this thesis, this decision was often used as

⁶⁰ Supra, footnote 28.

⁶¹ Supra, footnote 4, and see the discussion in Chapter 4, Section 4.3.2.

⁶² See the discussion in Chapter 4, Section 4.3.1.

⁶³ Supra, footnote 4.

⁶⁴ Id.

⁶⁵ Supra, footnote 13.

an illustration of the Commission's ability to intervene in market behaviour in the absence of clearly articulated and evidenced adverse effects on consumers and, thus, of the need to adjust the legal standard applied in the investigation under Art 81(1) EC. The CFI's review, however, revealed no error in the Commission's assessment under this provision. The present section (1) compares the call for a *rule of reason* as made by Métropole with the proposal for a more empirical approach formulated above; (2) it examines certain developments that have taken place since the adoption of this ruling to see how this proposal might currently be received by the Courts; and (3) it returns to the Art 82 EC case law on consumer harm that was discussed above in Chapter 4. As a preliminary issue, it must be pointed out that the various arguments for and against the proposed reform that will be advanced are of an essentially legal nature. It is not inquired, as we did above, what the implications are for the behaviour of different types of firms, enforcers and, ultimately, the efficiency of enforcement. Rather, it is asked what scope there is for the law on effects-based analysis under Art 81 EC, as it stands today, to evolve in such a way as to incorporate our proposal. In this regard, it should be noted that even if there would be unsurmountable legal obstacles to the adoption of this approach, this does not invalidate the incentive analysis made above.

Métropole seen in its context

As we have seen, the Commission took issue with a clause granting TPS exclusive rights to content produced by its parents and consequently limited the duration of the exemption to three years.⁶⁶ Métropole and the other parents argued before the Court that the Commission's investigation under Art 81(1) EC should have included an economic analysis of the restraint and its context. Application of such a *rule of reason* would have shown, so they claimed, that the clause served to facilitate the penetration of a market that was heavily dominated by an incumbent. According to Métropole, the Commission should have concluded that the agreement promoted competition, instead of lessening it, which would have obliged it to grant negative clearance. In its findings, the Court considered that there is no room in the analysis under that provision to weigh the pro and anti-competitive effects of a restriction, as this would make Art 81(3) EC lose much of its effectiveness.

⁶⁶ Id.

One way to understand why the Court decided the case in this way is to consider the broader context in which it operates and, in particular, its relation *vis-à-vis* the ECJ and the Commission. The CFI was created to take pressure of the ECJ and has competence, in particular, to hear cases that involve analysis of complex issues of fact.⁶⁷ It is generally recognised that the CFI subjects the Commission's analysis of facts to tougher scrutiny than the ECJ did before it, leaving the Commission less room for the exercise of discretion.⁶⁸ Tough scrutiny of the Commission's factual analysis, however, is not necessarily the same as taking the lead in the further development of European antitrust by setting out new substantive directions in the way the ECJ did in the foundational period.⁶⁹ In more recent times, the initiative on incorporating advances in economics into European antitrust law has generally been with the Commission and the Courts tend to limit their review of Commission decisions to verifying that no manifest errors of assessment have been made.⁷⁰ Add to that the presence of a body of ECJ precedents that allowed some but certainly not full out balancing under Art 81(1) EC⁷¹ and it becomes clear that the CFI had little room to boldly change course.⁷²

This is so, particularly, if we consider the nature of the plea made by *Métropole* and its fellow applicants. They argued that the agreement served to intensify competition on the relevant market. In other words, the benchmark for the *rule of reason* they proposed was the effect of the agreement on the *process* of competition. If the effect of the restraint on the competitive process (whether evidenced by restrictions of commercial freedom or market structure) is the point of reference, there is indeed no obvious way to distinguish between pro-competitive effects that should be heard in the analysis under Art 81(1) EC and those that would have to be dealt with in the examination pursuant to Art 81(3) EC.⁷³

⁶⁷ See Chapter 2, Section 2.4.

⁶⁸ See e.g. Lehmkuhl (2008), Nehl (1999), and Van der Woude (1993). This is evident, also, in cases like *European Night Services v. Commission* ([1998] ECR II-3141).

⁶⁹ In this regard, see Gerber (1998: 352 a.f.).

⁷⁰ *Id.* See also the discussion in Chapter 2, Section 2.4.

⁷¹ See the discussion in Chapter 2, Section 2.3.

⁷² Another concern may have been that accepting *Métropole's* argument would have restricted the Commission's enforcement capacity which was still limited in 2001 due to the burdens imposed by the notification system.

⁷³ Note that *Métropole* does not completely close the door to hearing exculpation within the framework of Art 81(1) EC. Referring to several ECJ precedents, the Court indicated that if a restriction is ancillary to the agreement as a whole, it does not fall foul of this provision. To qualify, a restriction must be objectively necessary for the implementation of the main operation and proportionate to it. It

The implications of the proposal and changed circumstances

The proposal made above to increase the requirements to show harm in the assessment under Art 81(1) EC differs substantially, however, from the *rule of reason* that was advocated by Métropole and rejected by the CFI. When consumer harm is taken as the relevant benchmark in evaluating direct or indirect evidence, it becomes possible to distinguish between justifications according to the dimension of output to which they relate. If a defendant refutes the alleged theory of harm, by offering evidence that shows that this harm will not materialise or is produced by exogenous factors, his defence centres on the same dimension of output as the Commission's claim is concerned with. In such cases, there is no need for balancing opposing welfare effects. It must first be established whether there is a genuine risk of negative effects.⁷⁴ Such a defence is therefore not affirmative in nature and should be addressed by the Commission in the analysis under Art 81(1) EC. Art 81(3) EC comes into play if the defendant points to a beneficial effect produced in another dimension of output. Where, for example, exclusivity clauses are included in distribution agreements to enable improvements in quality or joint ventures are formed to speed up innovation, a restraint may simultaneously produce effects in different dimensions of output. Exclusivity or co-operation could both reduce the

expressly stated, however, that this ancillary restraints test may not be used to evaluate pro-competitive effects in the investigation under Art 81(1) EC (supra, footnote 4, at paras. 107-108).

⁷⁴ The case of *Bass* (supra, footnote 7) can be used as an example. As we have seen, this case involved exclusive purchasing and non-compete obligations imposed on tenants of outlets owned by Bass. The Commission feared that the hold that Bass thus acquired over its pub operators allowed it to charge them elevated prices for supplies. The Commission interpreted a differential in the prices paid by tied house operators on the one hand and unbound operators on the other, as an indication of the exercise of such power. Bass countered that this price differential had nothing to do with the restrictive clauses in its distribution contracts. It argued that the surcharge was caused by extra services provided to tied house operators. By denying the causality behind the price differential, Bass focused its defence on the same dimension of output as the Commission's allegations were concerned with. The essential question in this case was therefore not which of two opposing forces was stronger, but rather which of two mutually exclusive effects actually occurred. This has nothing to do with balancing.

It should be noted, also, that it is by no means the case that the Commission's theory of harm as developed under Art 81(1) EC will necessarily centre on price effects. Take, for example, the (Art 82 EC) case of *Microsoft* (decision of 21 April 2004, published on the Commission's website). The Commission took action against (1) a refusal by Microsoft to supply information to a competitor in the server market about how to make its server software compatible with the Windows operating system for personal computers (see the discussion in Chapter 4, Section 4.3.1), and (2) the tying of the Windows Media Player to the Windows operating system (see the discussion below in the text accompanying footnotes 93-99). In both cases the Commission's objection ultimately was that Microsoft's behaviour reduced the variety of choice available to consumers. Had this case been argued under Art 81 EC, the empirical approach advocated here would require that any defence formulated by Microsoft relating to a different dimension of output than consumer choice – for example that the bundle allowed for cost savings – would have had to be dealt with under the scope of Art 81(3) EC.

volume of output and improve quality, choice, or innovation.⁷⁵ The role of Art 81(3) EC will be to allow defendants to show the existence of such efficiencies and to prove that they outweigh the restrictive effect found in the analysis under Art 81(1) EC. Therefore, imposing a consumer harm requirement does narrow the scope of application of Art 81(3) EC. But, it cannot reasonably be argued that there is a risk of turning this provision into a dead letter, particularly since this narrowing will be accompanied by a commensurate reduction in the scope of Art 81(1) EC. And in this regard it should be remembered that in *Métropole* the CFI said more on the investigation under Art 81(1) EC than the fact that it offers no scope for weighing of pro-competitive effects. It also pointed to a developing trend in the case law to require more than a mere restriction of competition to be shown in order to let the burden shift to the defendant. Arguably, the proposal formulated here fits in well with this trend.

There are several other reasons to expect that, in the current time-frame, the CFI might be receptive of an argument that the Commission should make more effort to show at least a genuine potential for harm. First of all, the Commission's decision in the case of *TPS*⁷⁶ (that led up to the judgment in *Métropole*)⁷⁷ was adopted at a moment when the modernisation was only just underway. The burdensome notification system was still in place and, crucially, the Commission's notice on the application of Art 81(3) EC and its guidelines on horizontal cooperation had not yet been published. The notice, in particular, contains explicit statements on the objective of Art 81 EC.⁷⁸ In the Commission's view, this provision serves to

⁷⁵ Suppose that in the case of *Bass* (supra, footnote 7) the non-affirmative defence discussed in footnote 73 would have failed (for example because market analysis would have revealed inter brand competition to be weakened in the UK beer market and quantitative analysis would have shown the price differential to be larger than could be explained by pointing at the extra services provided to tied house operators). In that case, Bass' options would not necessarily have been exhausted. It could have tried to argue that by securing a stable demand for the whole range of its products it was able to offer more choice to consumers (for example by developing and launching or reviving specialty beers that would otherwise be too risky to introduce). In the case of *Van den Bergh Foods* (supra, footnote 8), a very similar argument could have been developed. Whether or not in these specific cases such an argument would have been meritorious, is not important. The point is to illustrate that when a more conclusive showing of harm is required – and certain arguments are shifted to the investigation under Art 81(1) EC – there still remains a distinct and well defined category of defences that would have to be addressed in the analysis under Art 81(3) EC.

⁷⁶ Supra, footnote 13.

⁷⁷ Supra, footnote 4.

⁷⁸ Supra, footnote 1.

‘protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.’⁷⁹

Somewhat further it states that:

‘[for] an agreement to be restrictive by effect, it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable measure of probability.’⁸⁰

Arguably, this provides a legal basis to force the Commission to articulate a plausible theory of harm to consumers in its assessment of restraints under Art 81(1) EC, since there is considerable ECJ and CFI case law establishing that the Commission must respect reasonable expectations based on notices and guidelines.⁸¹ Moreover, developments in the field of merger control indicate that the CFI has become more critical of unsubstantiated economic analysis.⁸² In the summer of 2002 it annulled three high-profile Commission decisions. Whilst it emphasised the limited scope of judicial review in each of these judgments, in reality, the CFI went well beyond checking for ‘manifest’ errors of assessment.

Developments in the field of concentration control

The judgment in the case of *Airtours/First Choice* involved a decision by the Commission to block a hostile-takeover, which would have reduced the number of major holiday tour operators in the UK from four to three.⁸³ The Commission had based its decision on the finding that the merger would strengthen existing tendencies

⁷⁹ Id. at para. 13.

⁸⁰ Id. at para. 24. In a footnote the Commission adds the following: ‘[it] is not sufficient in itself that the agreement restricts the freedom of action of one or more of the parties,’ for which it refers to paras. 76 and 77 of the CFI’s ruling in *Métropole* (supra, footnote 4). It then continues to state that: [this] is in line with the fact that the object of Article 81 is to protect competition on the market for the benefit of consumers.

⁸¹ In the case of *Suiker Unie v. Commission* (Cases 40/48 etc., [1975] ECR 1663) the ECJ blocked the imposition of a fine because the notice on commercial agents had created the impression that the conduct in question was not prohibited. See also *Daesang and Sewon v. Commission* (Case T-230/00, [2003] ECR II-2733, at para. 38), *CMA CGM v. Commission* (Case T-213/00, [2003] ECR II-913, at para. 252), *Hercules v. Commission* (Case T-7/89, [1991] ECR II-1711). See also Petit and Rato (2008) and Lehmkuhl (2008).

⁸² See Collins (2004), Bailey (2003), and the long list of references provided in Vesterdorf (2005: 4).

⁸³ *Airtours v. Commission*, Case T-342/99, [2002] ECR II-2585.

in the market to collective dominance. Collective dominance is one of the most complex and problematic areas of European competition policy.⁸⁴ In oligopolistic markets, a situation may arise where the market is so transparent that firms are able to effectively coordinate their behaviour without entering into agreements or other forms of communication that could be qualified as a concerted practice under Art 81 EC. This is frequently referred to, also, as tacit collusion.

Whilst the possibility of the adoption of a common policy was one of the focal points in earlier case law on collective dominance,⁸⁵ the Commission, in this case, went further by arguing that it was not necessary to show that firms could tacitly collude in order to find that the merger might strengthen tendencies to collective dominance. According to the Commission, it would be sufficient to show that the merger makes it rational for the oligopolists to act, individually, in ways which will substantially reduce competition between them.⁸⁶ The CFI rejected this argument and clearly indicated that collective dominance presupposes a common policy and incentives not to depart from it.⁸⁷ And, more importantly, for our purposes, the Commission also got it wrong on the facts. The Commission had not succeeded in demonstrating that in the post-merger setting the remaining firms would no longer have sufficient incentives to compete; it had wrongly concluded that the market would be so transparent as to allow these firms to monitor each other's behaviour, it had failed to identify the existence of adequate retaliatory measures with which to punish cheating, and it had underestimated the response of smaller competitors, potential competitors and customers to collusive practices that might undermine their effectiveness. Crucially, the CFI stated that the Commission would have to produce 'convincing evidence' in order to prohibit a merger on the grounds of collective dominance⁸⁸ and ultimately came to the following conclusion:

⁸⁴ For discussions on this topic, see e.g. Whish (2003: 518) and O'Donoghue and Padilla (2006: 137).

⁸⁵ See *France v. Commission* (also known as *Kali und Salz*), Case C-68/94 and 30/95, [1998] ECR I-1375.

⁸⁶ *Airtours/First Choice*, [2000] OJ L93/1, at paras. 54-55, and 151-153.

⁸⁷ *Supra*, footnote 83, at para. 61, where it describes collective dominance as a situation where a merger 'would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive process, without having to enter into an agreement or resort to a concerted practice within the meaning of Art 81 EC [...].'

⁸⁸ *Id.*, at para. 63.

‘[F]ar from basing its prospective analysis on cogent evidence, [the Commission’s decision] is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as significantly to impede effective competition in the relevant market.’

The judgments in the cases of *Schneider/Legrand*⁸⁹ and *Tetra-Laval/Sidel*⁹⁰ suggest that this exacting standard is also applied outside the highly complex context of collective dominance. The former case involved the merger between two producers of electrical equipment with very strong positions on the French market. The CFI determined that the Commission had made errors of assessment of ‘undoubted gravity’ by failing to consider the different degrees of competition in each of the national markets it identified and, in particular, by wrongly assuming that the parties’ dominance in certain product markets in France would translate into dominance on other markets.⁹¹

The second case involved the merger between the world leader in carton packaging materials (Tetra-Laval) and a French producer of plastic bottles (Sidel), which the Commission had blocked on the ground that it would enable Tetra-Laval to leverage its dominance in the carton packaging market into the plastic packaging market. Given that, according to the Commission, some time would elapse before dominance was thus acquired in the adjacent market, the CFI indicated that the Commission’s analysis of the merged-entity’s future market position, whilst allowing for a margin of discretion, had to be ‘particularly plausible’.⁹² Applying this standard, it once again came to the conclusion that the Commission’s analysis was based on insufficient evidence and on erroneous economic assessment.

⁸⁹ *Schneider/Legrand v. Commission*, Cases T-310/01 and 77/02, [2002] ECR II-4071.

⁹⁰ *Tetra Laval vs Commission*, Cases T-5/02 and 80/02, [2002] ECR II-4381.

⁹¹ *Supra*, footnote 89, at paras. 404-420.

⁹² *Supra*, footnote 90, at para. 162.

Developments in the field of abuse of dominance

By contrast, recent developments in the law on Art 82 EC might be pointed at to argue against the proposal for a more empirical approach focused on harm. We saw, in Chapter 4, that in the cases of *British Airways*⁹³ and *Microsoft*⁹⁴ the ECJ and the CFI expressly rejected the argument that the Commission should have shown that the conduct in question caused harm to consumers. Both Courts indicated that Art 82 EC covers not only practices which may prejudice consumers directly, but also those which cause prejudice to consumers indirectly by impairing an effective competitive structure.

It should, first of all, be noted that these judgments leave little doubt that the ultimate purpose of Art 82 EC is to protect consumers.⁹⁵ What we are dealing with here is a question of the operational objectives of this provision: what constitutes sufficient evidence to show that Art 82 EC has been violated?⁹⁶ These rulings should be interpreted to indicate that showing evidence of a significant impairment of market structure may be sufficient to assume that consumers are or will be harmed. It is not altogether straight forward, however, that the same can be said outside the context of Art 82 EC. To appreciate why, let us start by looking at the Commission's tying claim in the *Microsoft* case.⁹⁷

⁹³ Judgment of the ECJ in Case C-95/04 P of 15 March 2007.

⁹⁴ Judgment of the CFI in Case T-201/04 of 17 September 2006.

⁹⁵ This appears to contradict the view expressed by certain authors, such as Fox (2001: 373), Hildebrand (2002), Amato (1997) and Gifford and Kudrle (2003), that in Europe antitrust law – and especially Art 82 EC – is understood to protect market structure and market dynamism – particularly access and freedom to trade of smaller participants – from conduct by (jointly) powerful undertakings and that, consequently, the behaviour that is guarded against includes both exploitation of consumers, and exclusion of competitors and distributors. Another possibility is that the EC is more concerned with dynamic efficiency than the US. However this may be, it should be realised that even if EC antitrust law could be relied on to intervene in business behaviour so as to protect the exclusive interests of competitors, as these authors argue, or if considerations regarding dynamic efficiency make European policymakers more concerned about protecting market structure, this would not affect the validity of the analysis made in the previous chapters of this book, nor the effectiveness of the remedy proposed. It should be well understood that the core of the proposal formulated above is essentially neutral as to the goals pursued in the enforcement of Art 81 EC. The analysis made in the preceding chapters shows that a significant share of the Commission's decisions are not motivated in great detail, particularly on the point of the criterion used to assess the harmfulness of the effects produced by a restraint. And it was argued that legal certainty – and the efficiency of enforcement – can be increased by adjusting the legal standard so as to require more precision from the side of the Commission. Based on the clear wording in the Commission's Notice on the application of Art 81(3) EC (supra, footnote @), it was assumed that consumers are the interest group protected by European antitrust policy. Should this group be larger, this would simply mean that, for example when dealing with exclusionary practices, the Commission would be required to be more specific about the harm sustained by either consumers or competitors.

⁹⁶ See the discussion in Chapter 2, Section 2.4 on the distinction between ultimate, intermediate and operational objectives.

⁹⁷ Supra, footnote 94.

This part of the Commission's decision centered on Microsoft's Windows Media Player (WMP). Media players are software programmes with which audio and video content can be played back on computers. The Commission objected to the integration of the WMP into the Windows operating system. It argued that, given that Windows is pre-installed on more than 90% of the computers sold all over the world, the bundle of these two products guaranteed WMP ubiquity in the market. Rival producers of media player software were shown not to dispose of an equally efficient alternative means of distribution. The result is that content providers are induced to encode their products primarily in a Microsoft-compatible format and that software developers have incentives to write applications mainly for WMP; the Commission found significant indications for both claims.

Given Microsoft's enormous size on the operating systems market, its record of trying to carry this power over to adjacent markets and the fact that it offered no convincing justification for the bundle in question,⁹⁸ it is understandable that the Court thought the Commission's evidence sufficiently probative to support a finding that Art 82 EC had been infringed (and to reject the argument that more conclusive evidence of harm was required).⁹⁹ In the context of Art 81 EC, however, there will generally be less room to assume harm solely on the basis of structural analysis. As defendant's market shares decline – and often the firms targeted under Art 81 EC are relatively smaller than those targeted in Art 82 EC proceedings – it will be increasingly doubtful whether a restriction leads to 'negative effects on prices, output, innovation or the variety or quality of goods and services'.

Finally, it could be argued that the CFI's recent ruling in the case of *Glaxo v. Commission* gives some credence to the assertion that the CFI may be convinced to force the Commission to show actual effects on consumers in cases where it intervenes on the basis of a not so obvious claim.¹⁰⁰ As we saw before, this case involved an agreement between Glaxo and wholesalers in Spain that required them to pay higher prices for medicines which they exported than for products resold on the

⁹⁸ Microsoft argued that consumers prefer to have a media player pre-installed on their computer. The Commission agreed on this principle, but countered that there was no need for Microsoft to determine that this should be the WMP. Sellers should be left a real choice to install another type of media player.

⁹⁹ Moreover, there was evidence in the record that technologically-superior media players could not manage to compete with the WMP and it is not easily seen how the Commission might have proceeded to gather more evidence to substantiate the specific counterfactual at issue in this part of the case.

¹⁰⁰ *Glaxo v. Commission*, judgment of 27 September 2006 in Case T-168/1. See the discussion of this case in Chapter 2, Section 2.4.

Spanish market. The aim was to prevent these resellers from taking advantage of differences in the prices for these same products set by health insurance schemes in other Member States, notably the UK. Glaxo argued that such parallel trading undermined its capacity to innovate. Despite the fact that such an agreement would ordinarily be subjected to the object standard, the Court determined that a more broadly construed investigation was called for. In particular, it required that the effect of the agreement on consumers be taken into account. The reason the court adopted this stance is that, in the context of the heavily regulated market for pharmaceuticals, it was not obvious that restrictions on parallel imports would have the effects that could otherwise be presumed.¹⁰¹

7.5 Conclusion

In this final chapter we have studied how firms can be sent a clearer and more consistent signal concerning the dividing line between permissible and impermissible restrictions of competition. The way to achieve this, it was argued, is for the Courts – and in their wake, defendants – to insist that the Commission presents an intelligible theory of the harm that it expects from a restraint and as much empirical evidence as needed to render this claim sufficiently plausible before the burden can shift. This will improve the available guidance on the crucial issues of antitrust harm and balancing of positive and negative effects. In addition, it will force the Commission to concentrate enforcement efforts on those cases of which we are more certain that harm has actually occurred and, thus, serves to ensure potential offenders that the less obvious it is to them that the contract they intend to sign will harm consumers, the less likely it is that it will be challenged. There is no risk that Art 81(3) EC will be emasculated as a consequence – the principle argument advanced in the leading case on the division of the burden of proof in Art 81 EC, *Métropole*.¹⁰² As the place for assessing arguments to the effect that the agreement produces countervailing benefits in another dimension of output than the Commission’s allegations relate to, this provision will continue to play a vital role in the analysis of restraints.

¹⁰¹ Id., at paras. 110-134. For commentary on this ruling, see Korah (2007) and Junod (2007).

¹⁰² Supra, footnote 4.